IN THE HIGH COURT OF BOMBAY AT PANAJI

CRIMINAL REVISION APPLICATION NO. 55 OF 2006

1. Shri Shaba Laxman Pilankar,
   Omkar Traders,
   Shop No. 36,
   Bicholim Market,
   Bicholim, Goa.

2. Omkar Traders,
   Through its proprietor
   Shri Vasudev Damodar Kelkar
   Shop no. 36,
   Bicholim Market,
   Bicholim Goa.
   (Deleted as per Order dt. 21.02.2007)

3. Shri Vasudev Damodar Kelkar,
   Shop No. 36,
   Municipal Market,
   Bicholim Goa. ..... Petitioners/
   Original Accused

Versus

STATE,
through Casmiro da Silva,
Food Inspector,
Director of Food and Drugs
Administration,
Panaji. ..... Respondents

Mr. V. P. Thali, Advocate for the Petitioners.
Ms. Winnie Coutinho, Public Prosecutor for the State.

Coram:- N. A. BRITTO, J.

Date:- 22nd February, 2007.

ORAL JUDGMENT

Admit. By consent heard forthwith.

2. This revision petition is filed by the accused, whose conviction has been upheld under Section 16(1A)(i) read with Section 7(i) read with Section 2(ia) (f) of the Prevention of Food Adulteration Act, 1954, (*Act*, for short), by Judgment/Order dated 10.11.2006, of the learned Additional Sessions Judge, Panaji.

3. The Petitioner no.3/A3, is the proprietor of the establishment known as Omkar Traders and the Petitioner no.1/A1 was his salesman. Both the said accused were prosecuted by the Food Inspector along with the establishment with the allegation that the accused no.3 had sold through accused no.1 to the Complainant-Food Inspector, for the purpose of analysis, 450 grams of turmeric whole, for a sum of Rs.18/-, which when analysed by the Public Analyst, was found to contain insect damaged extraneous matter of 73.0% by weight as against the permissible limit of 5.0% by weight as prescribed by item No.A.05.20 of Appendix B, of the Prevention of Food Adulteration Rules, 1955. (*Rules*, for short).

4. From the complaint filed by the Food Inspector, it can be seen that the Complainant-Food Inspector/Shri D' Silva, had visited the establishment of the said Omkar Traders, situated at Shop no. 36, in Bicholim Market, where A1/Pilankar was present and of which A3-Kelkar was the Proprietor. As per the complaint, A1-Pilankar, was selling various types of food articles and upon inspection of food articles exposed for sale to the public, the Complainant purchased 450 grams of turmeric whole, for the purpose of analysis, as per the notice served upon A1-

Pilankar, in Form VI, dated 25.02.1994 and which he divided into three parts and each part was packed in three clean, dry, empty polythene bags and all the packets were labelled with a common code having stated serial number of the Local (Health) Authority, with signatures of A1-Pilankar and the witnesses present and then each packet was wrapped completely into thick brown paper and a paper slip bearing stated code and serial number duly signed by the Local (Health) Authority, was pasted on the wrapper of each packet in such a way that the slip went round completely from the top to the bottom of each packet and then each packet was fastened on both the sides with a strong thread and duly sealed in the presence of A1-Pilankar and witnesses at four distinct points with sealing wax covering the knots of the thread and then the signatures of A1-Pilankar and the witnesses were obtained on each packet in such a way that the paper slip and brown paper carried the part of the signatures and A1-Pilankar was paid an amount of Rs.18/- towards the cost of the said turmeric whole and a receipt was obtained from him and a panchanama was prepared, which was signed by the Complainant, A1-Pilankar and the witnesses, and on 28.02.1994, a part of the said sample along with Memorandum in Form VII, having stated number and date, having sealed packet, was sent to the Public Analyst for analysis and a copy of the Memorandum along with the specimen impression of the seal used to seal the packets were also sent to the Public Analyst in a separate sealed cover and the remaining two sealed packets along with two copies of Memorandum, were sent to the Local (Health) Authority on the same day. Further it was the case of the Complainant that the Public Analyst vide report dated 31.03.1994, had opined that the sample sent and analyzed by him, was insect infested and had

insect damaged matter in excess of the maximum permissible limit prescribed for it and, therefore, had to be considered as adulterated.

5. The Complainant Food Inspector/Shri D'Silva, filed the complaint on or about 21.07.1994 before the Court of the learned J.M.F.C., Bicholim, and it appears that, thereafter, before his evidence could be recorded, he died. There is no dispute that at the time of inspection, Shri D'Silva, was accompanied by another Food Inspector namely Shri Waigade/Pw1 and the latter along with one Ishwar Sitap, had acted as panch witnesses to the panchanama prepared by the Food Inspector Shri D' Silva. After the death of Shri D' Silva, Food Inspector Shri Waigade/Pw1, was examined and this was with a written consent of the Local Health Authority given vide letter dated 26.06.1995-exhibit P.w.1/A, written to the learned J.M.F.C. Both the Courts below have relied upon the evidence of the Food Inspector Shri waigade/Pw1, having been supported by the documents produced by him, and have convicted the accused as aforesaid. This, both the Courts below did, after placing reliance on the decision of the Apex Court in ***Prem Ballab & anr. v. State (Delhi Admin) (1977, Cr.L.J. 12/AIR 1977 S.C. 56)***. That was a case where the prosecution had not produced any independent witness to depose to the taking of the sample and the Supreme Court observed that there was no rule of law that conviction cannot be based on the sole testimony of a Food Inspector. It is only out of a sense of caution that the Courts insist that the testimony of a Food Inspector, should be corroborated by some independent witness. This is a necessary caution which has to be borne in mind because the Food Inspector may in a sense be regarded as an interested witness,

but this caution is a rule of prudence and not a rule of law. If it were otherwise, it would be possible for any guilty person to escape punishment by resorting to the device of bribing panch witnesses. Both the Courts below have come to the conclusion that the evidence of Shri Waigade/Pw1, is reliable and trustworthy and, I have no reasons to disagree with the concurrent findings of fact given by both the Courts below, on that score.

6. Nevertheless, certain points of law have been raised by Shri Thali, the learned Counsel on behalf of the accused.

7. Learned Counsel submits that the complaint in this case was filed by the Food Inspector Shri D' Silva and it ought to have been filed by the Director, Foods and Drugs Administration, as it is he, who was authorized to initiate the prosecution by virtue of the Order of the State Government bearing no. 10/8/90-I/PHD dated 21.02.1991, published on Official Gazette dated 02.05.1991, No.5, Series II. Learned Counsel submits that the Director could not have further delegated the power given to him by the State Government to the Food Inspector and, therefore, the complaint filed by Food Inspector Shri D' Silva, is illegal and without jurisdiction and in violation of Section 20 of the Act, and therefore, no conviction could be based on such a complaint. Learned Counsel has placed reliance on the case of ***A.K. Roy & anr. v. State of Punjab & Ors. [(1986) 4 S.C.C. 326]***.

8. This point was raised on behalf of the accused before the learned

Additional Sessions Judge and has been decided against the accused. Section 20 deals with cognizance and trial of offences under the Act, and sub-section (1) thereof provides that no prosecution for an offence under this Act, not being an offence under Section 14 or Section 14A, shall be instituted except by, or with the written consent of, the Central Government or the State Government or a person authorised in this behalf, by general or special order, by the Central Government or the State Government. The controversy raised is no longer res integra. The decision in ***A.K. Roy & anr. v. State of Punjab & Ors.***(supra), came for consideration before the Apex Court in ***Food Inspector, Health Department, U.T., Chandigarh v. M/s. Krishna Dhaba (AIR 1994 S.C. 664)***, and the Apex Court has held that a complaint under Section 20, could be instituted apart from Central or State Government, by a person authorized in that behalf. Such a person who is authorized to institute, complaint could, "give his written consent for the prosecution by the Food Inspector". The Apex Court referring to ***A. K. Roy*** (supra), held that the Chief Medical Officer, Chandigarh, in terms of notification dated 29.04.1967, issued by the Chandigarh Administration, in exercise of the powers conferred by sub-section (1) of Section 20 of the Act, was a person authorized to institute a complaint and therefore he could give his consent as well for launching of prosecution and in doing so, he was neither delegating his power nor acting contrary to Section 20. He was acting within the scope of authority as a person authorized to institute complaint under Section 20(1) of the Act. In the case at hand, the Government of Goa by virtue of notification dated 21.02.1981, published on Gazette dated 02.05.1991, series II, No. 5, had authorized the Director, Food and Drugs Administration for the purpose of Section 20 of the

Act and the Complainant with a written consent dated 15.07.1994-Exhibit Pw1/H, had filed the complaint and, therefore, it could not be said that the complaint was filed without jurisdiction in the light of the said Judgment of the Apex Court in ***Food Inspector, Health Department, U.T., Chandigarh v. M/s. Krishna Dhaba*** (supra).

9. Next, learned Counsel submits that the case of the accused was tried as a summons case but in terms of Section 16A of the Act, the accused were required to be tried in a summary way and since the accused was not tried summarily, the entire trial is without jurisdiction and, therefore, the conviction itself deserves to be quashed and set aside. Learned Counsel has placed reliance on ***Devarkonda Ramesh v. The State of A.P. (2003 Cri. L.J. 2797)***.

10. Section 16A of the Act provides that notwithstanding anything contained in the Code, (Code of Criminal Procedure, 1973), all offences under sub-section (1) of Section 16, shall be tried in a summary way by a Judicial Magistrate of the Fist Class, specially empowered in this behalf by the State Government or by a Metropolitan Magistrate and the provisions of Section 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trial: Provided that in the case of any conviction in a summary trial under this Section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year. I am unable to accept the submission of the learned Counsel on behalf of the accused for reasons more than one. The accused having been tried as in a summons case, has lost nothing but on the contrary must have gained something by way of more

elaborate cross examination which would not have been available to them in case they were tried summarily. There is also no evidence to suggest whether the concerned Magistrate who tried the accused was specially empowered by the State Government to try the case summarily as contemplated by Section 16A of the Act. Learned Counsel points out to the penultimate para of the complaint to say that the Court was empowered to try the case in a summary manner but the said averment in the absence of the relevant notification being produced cannot be taken as proof that the very Magistrate who tried the accused was specially empowered to try the case in summary manner. The ratio of ***Devarkonda Ramesh v. The State of A.P.*** (supra), could not be applied to the facts of the case at hand. In that case, the accused was tried by procedure prescribed for a warrant case and the Court felt that by proceeding with the trial of a warrant case, the accused was deprived of a speedy trial. In my view, the accused could complain of no prejudice only because their case was tried as a summons triable case and not in a summary way and, being so, the trial could not be said to be vitiated. At its worst, it must be observed that this would at the most be an irregularity and not illegality vitiating the trial, once trial is completed and conviction recorded.

11. Learned Counsel then submits that the mandatory provision of Section 13(2) of the Act was not complied with, and therefore, the accused deserves to be acquitted. Section 13 of the Act deals with the procedure to be followed by Local (Health) Authority, after the receipt of the report from the Public Analyst, and, sub-section (2) of Section 13 of the Act provides that on receipt of the report of the result

of the analysis under sub-section (1) to the effect that the article of food is adulterated, the Local (Health) Authority shall, after the institution of prosecution against the persons from whom the sample of the article of food was taken and the person, if any, whose name, address and other particulars have been disclosed under Section 14A, forward, in such manner as may be prescribed, a copy of the report of the result of the analysis to such person or persons, as the case may be, informing such person or persons that if it is so desired, either or both of them may make an application to the Court within a period of ten days from the date of receipt of the copy of the report to get the sample of the article of food kept by the Local (Health) Authority analyzed by the Central Food Laboratory. Sub-section (2A) of Section 13 of the Act further provides that when an application is made to the Court under sub-section (2), the Court shall require the Local (Health) Authority to forward the part or parts of the sample kept by the said Authority and upon such requisition being made, the said Authority shall forward the part or parts of the sample to the Court within a period of five days from the date of receipt of such requisition. There is no doubt that the provisions of Section 13(2) of the Act are mandatory and they are meant to give opportunity to the accused to contest the report of the Public Analyst by obtaining report of the Central Food Laboratory, whose report has been given finality. In the case of ***State of Orissa v. Gauranga Sahu (AIR 2004 S.C. 1233)***, the Apex Court observed that the forwarding of a copy of the report is not only a ritual, but a statutory requirement to be mandatorily observed in all the cases. Despatch of such report, is intended to inform the accused of his valuable right to get the other sample analyzed from the Central Food Laboratory. The Apex Court has also held that it is not open

to the High Court in revision to interfere with concurrent finding of facts based on evidence that the report was served on the accused. In the case at hand, the record shows that the complaint was filed on 21.07.1994 and by registered letter dated 28.07.1994, the Local (Health) Authority sent to both the accused a copy of the report of the Public Analyst. Pursuant to the said letter dated 27.07.1994, accused no.3, filed an application to the Court dated 06.08.1994, in terms of Section 13 (2A) of the Act. The Local (Health) Authority vide its letter dated 28.03.1994, sent one of the samples kept under its custody to the trial Court to be sent for testing to the Central Food Laboratory and the Central Food Laboratory by its report dated 06.12.1994, has opined that the insect damaged matter was of 93.2% by weight. As rightly observed by the learned trial Court, the Certificate signed by the Director of Central Food Laboratory, does not require any formal proof in terms of sub-section 5 of Section 13 of the Act and the same can be used as evidence. In terms of the proviso below, sub-section (5) of Section 13 of the Act, the said Certificate is made final and conclusive of the facts stated therein. It is contended on behalf of the accused, particularly accused no.1, that there is no evidence that the said letter dated 28.07.1994, sent by Local (Health) Authority, was received by A1. It does appear that this controversy was raised before the learned Additional Sessions Judge by contending that report of the Public Analyst was not sent to either of the accused either within the period of ten days or otherwise. The letter dated 28.07.1994, a copy of which was endorsed to the trial Court, sent by the Local (Health) Authority, shows that it was sent by registered A.D. and, if it was received by A3-Kelkar, and who acted upon it by filing an application dated 06.08.1994, there is no reason why A1-Pilankar, ought not to have

received it when the latter was the employee of A3-Kelkar and the notice was sent to the same address. It is quite probable that since A3 had acted on the said letter dated 28.07.1994, it was thought not necessary that A1 also should have done the same, separately. Therefore, the contention that the provisions of Section 13(2) of the Act were not complied with, cannot be accepted.

12. Next, learned Counsel submits that Rule 14 of the Rules, was not complied with. Rule 14 of the Rules provides that the samples of food for the purpose of analysis, shall be taken in clean dry bottles or jars or in other suitable containers, which shall be closed sufficiently tight to prevent leakage, evaporation or in the case of a dry substance, entrance of moisture and shall be carefully sealed. The complaint in this case, has a clear statement made that the purchased turmeric whole was divided into three parts and each part was packed in three clean, dried empty polythene bags so also there is a statement of the Waigade/Pw1, in his evidence to support the said averment, which has been accepted by both the Courts below and, therefore, there is no reason for me to conclude that the provisions of Rule 14 of the aforesaid Rules, were not complied with.

13. Learned Counsel then refers to Form VII-exhibit Pw1/F and contends that there is no mention that the other two parts of the sample were forwarded to the Local (Health) Authority. In this regard also, there is a clear averment in the complaint that the remaining two parts of the sample were sent to the Local (Health) Authority on 28.02.1994 and to the same effect, there is a statement of Shri

Waigade/Pw1 as well. The letter dated 23.08.1994, by which, one of the sample was sent to the trial Court to be forwarded to the Central Food Laboratory, confirms that the two samples were forwarded to the Local (Health) Authority, as stated in the complaint and confirmed by Shri Waigade/Pw1. It follows therefrom that the procedure prescribed by Section 11(1)(c)(ii) read with Rule 17(b) of the aforesaid Rules, was duly complied with.

14. Next, Learned Counsel submits that the turmeric whole was kept aside and was not kept for sale. Learned Counsel further submits that there is no reference in the panchanama that the said turmeric was kept for sale and, therefore, the accused could not be convicted. The expressions "sale" has been defined in Clause (xiii) of Section 2 of the Act. "Sale", with its grammatical variations and cognate expressions, means the sale of any article of food, whether for cash or on credit or by way of exchange and whether by wholesale or retail, for human consumption or use, or for analysis, and includes an agreement for sale, an offer for sale, the exposing for sale or having in possession for sale of any such article, and includes also an attempt to sell any such article. (Emphasis supplied). In case the turmeric whole was not kept for sale, nothing prevented A1/Pilankar from stating to be so to the Food Inspector/D' Silva, when he served a notice in form VI-exhibit Pw1/B, in terms of Rule 12 of the Rules. On the contrary, the evidence of Waigade/Pw1, shows that A1/Pilankar, not only sold turmeric to him but accepted its price and issued a receipt-exhibit Pw1/C. When A1/Pilankar, was questioned in his statement recorded under Section 313 of Cr.P.C., A1/Pilankar, feigned ignorance as regards the said payment.

Neither of the accused took the defence either in the cross examination or in their statements under Section 313 of the Code, that the said article was not meant for sale. The definition of sale under the Act, includes sale for analysis, and A1/Pilankar, having accepted the price for the article sold, the sale to the Food Inspector was complete and it was rather too late in the day to contend that the said article was not kept for sale.

15. Lastly, Learned Counsel contends that the Complainant/Shri D' Silva, could not have taken the services of another Food Inspector as a witness to the panchanama. There is no such prohibition in the Act and the mere fact that the Food Inspector/Shri D' Silva requested another Food Inspector to witness the taking of the sample along with another panch witness, can in no manner either vitiate the trial or the conviction recorded against the accused. If at all the other pancha was not examined, it was because he was not available to be examined at the trial. This can be seen from the summons issued to the said witness and confirmed by Waigade/Pw1.

16. Considering the facts of the case and in the absence of any statement either from Waigade/Pw1 or the Public Analyst, that the turmeric whole sold was unfit for human consumption or injurious to health, this would be a fit case to scale down the conviction to Section 16(1)(i) read with Section 7(i) read with Section 2(ia)(m) and to scale down the substantive sentence to six months RI (from one year SI), the fine imposed and the imprisonment in default thereof remaining unaltered.

The accused to surrender forthwith to undergo the sentence.

17. Revision is partly allowed on the above terms. Order accordingly.

N. A. BRITTO, J.

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